UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Priority	____
Send	____
Enter	____
Closed	____
JS-5/JS-6	____
Scan Only	____

CASE NO.: **CV 11-04846 SJO (MRWx)** **DATE:** **January 22, 2013**

TITLE: **Gregory Valentini, et al. v. Eric Shinseki, et al.**

==========

PRESENT: THE HONORABLE S. JAMES OTERO, UNITED STATES DISTRICT JUDGE

Victor Paul Cruz Courtroom Clerk	Not Present Court Reporter
COUNSEL PRESENT FOR PLAINTIFFS:	**COUNSEL PRESENT FOR DEFENDANTS:**
Not Present	Not Present

==========

PROCEEDINGS (in chambers): ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO SUPPLEMENT THE ADMINISTRATIVE RECORD [Docket No. 100]

This matter is before the Court on Plaintiffs' Motion to Supplement the Administrative Record ("Motion"), filed November 21, 2012. Defendants Eric Shinseki and Donna M. Beiter (collectively, "Defendants" or the "Government") filed their Opposition on December 26, 2012,[1] to which Plaintiffs filed their Reply on December 31, 2012. The Court found this matter suitable for disposition without oral argument and vacated the hearing set for January 14, 2013. *See* Fed. R. Civ. P. 78(b). For the following reasons, the Court **GRANTS IN PART** and **DENIES IN PART** Plaintiffs' Motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Court set forth the factual background of this action in great detail in its March 16, 2012, Order. (Mar. 16, 2012 Order, ECF No. 70). The Court incorporates that background here. In short, Plaintiffs in this case are severely disabled veterans with mental disabilities, brain injuries, or both.[2] (*See* FAC ¶¶ 8-17, ECF No. 24.) The FAC seeks redress for various harms Plaintiffs have allegedly suffered due to (1) Defendants' failure to provide meaningful access to disability benefits to which Plaintiffs are entitled; and (2) Defendants' failure to comply with procedural requirements and misuse of land that might otherwise be used to provide services to veterans.

---

[1] On December 21, 2012, the parties stipulated to allow Defendants to file their Opposition on December 26, 2012, two days after the Opposition was due under the Local Rules. (Joint Stipulation for Extension of Time to File Resp., ECF No. 103.) The Court **GRANTS** this stipulation.

[2] The individual Plaintiffs are joined by the Vietnam Veterans of America, which asserts associational standing on behalf of its members. (FAC ¶ 45; Opp'n to Mot. to Dismiss 1 n.1, ECF No. 35.)

(*See generally* FAC.) The FAC attempted to bring six causes of action against Defendants: one claim for violations of the Administrative Procedure Act ("APA"), two claims for violations of the Rehabilitation Act, and three claims for violations of the Government's duties as trustee of a charitable trust. (*See generally* FAC.) Defendants filed a Motion to Dismiss, which the Court granted in part and denied in part. The Court permitted two of Plaintiffs' six claims to proceed. (*See generally* Mar. 16, 2012 Order, ECF No. 70.) On May 25, 2012, Defendants filed a Motion for Reconsideration based on the Ninth Circuit's *en banc* decision in *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013 (9th Cir. 2012). The Court granted in part and denied in part this Motion for Reconsideration (*See generally* June 19, 2012 Order, ECF No. 87.) As a result, Plaintiffs' only remaining claim arises under the APA. This claim asserts that land deals entered into by Veteran Affairs Greater Los Angeles ("VA GLA") were improperly executed in violation of the APA.

On July 23, 2012, the Court ordered Defendants to file the Administrative Record in this case in anticipation of cross-motions for summary judgment. (Mins. of Scheduling Conference, July 23, 2012, ECF No. 90.) Defendants filed the Administrative Record on October 22, 2012. (*See generally* Certified Administrative Proceedings, ECF No. 96.) On November 20, 2012, Defendants filed a supplement to this Administrative Record. (ECF No. 98.) Plaintiffs thereafter brought the instant Motion seeking further supplementation on November 21, 2012.

II. DISCUSSION

A. Legal Standard

Under the APA, judicial review of agency decision-making is based on the administrative record compiled by the agency and submitted to the court. *Friends of the Earth v. Hintz*, 800 F.2d 822, 829 (9th Cir. 1986); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971). The administrative record consists of all materials considered "either directly or indirectly" by an agency when making the decision in question. *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555-56 (9th Cir. 1989); *see also Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993) (finding that the administrative record "includes everything that was before the agency pertaining to the merits of its decision"). An agency's designation and certification of the administrative record is entitled to a presumption of regularity. *McCrary v. Gutierrez*, 495 F. Supp. 2d 1038, 1041 (N.D. Cal. 2007) (citing *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993)). However, additional discovery is sometimes permitted "when those challenging agency action have contended the record was incomplete, in order to provide a record of all documents and materials directly or indirectly considered by the agency decisionmakers." *Pub. Power Council v. Johnson*, 674 F.2d 791, 794 (9th Cir. 1982); *see also Portland Audubon Soc'y*, 984 F.2d at 1548 (explaining that "[w]hen it appears the agency has relied on documents or materials not included in the record, supplementation is appropriate").

/ / /

B. Analysis

In their Motion Plaintiffs generally contend that the Administrative Record filed by Defendants is incomplete and seek to supplement it to include (1) documentation regarding additional land-use agreements; (2) additional financial documentation for those land-use agreements included in the Administrative Record; (3) documentation related to the Sharing Agreement Database; and (4) other miscellaneous documents. (*See generally* Mot.) Additionally, Plaintiffs seek to depose Ralph Tillman ("Tillman"), the declarant who certified the Administrative Record submitted by Defendants, in order to "determine the proper scope of the Record." (Mot. 14; Certification of the Administrative R. ¶ 2, ECF No. 96-1.) The Court addresses each of these arguments in turn.

1. Additional Land-Use Agreements

The Administrative Record as currently filed includes documentation concerning eleven land-use agreements entered into by VA GLA pursuant to 38 U.S.C. §§ 8151-8153. (*See generally* Administrative R., ECF No. 96.) These provisions authorize the Department of Veteran Affairs ("DVA") to enter what are known as enhanced sharing agreements ("ESAs"), which are "agreements with health-care providers in order to share health-care resources with, and receive health-care resources from, such providers while ensuring no diminution of services to veterans." 38 U.S.C. § 8151.

Plaintiffs contend that this documentation is incomplete because it fails to account for another twelve land-use agreements that Plaintiffs allege violated the APA. (Mot. 7.) Ten of these agreements were named in the Master Plan for the West Los Angeles VA Medical Center (the "WLA Campus"). (Mot. 6-7.) Plaintiffs allege that two other agreements with Enterprise Rent-A-Car and Tumbleweed Transportation must exist by virtue of the fact that these entities operate on the WLA Campus. (Mot. 7; Reply 2 n.2.)

Defendants respond that the Administrative Record includes documentation for all relevant land-use agreements because (1) Plaintiffs' APA claim is limited by its own terms to ESAs, and so other types of land-use agreements are not relevant; and (2) Plaintiffs do not have standing to challenge land-use agreements that were no longer in effect at the time Plaintiffs filed their Complaint, and so expired agreements are also not relevant. (Opp'n 6-10.) The Court addresses each of these contentions in turn.

a. Relevant Types of Land-Use Agreements

In their claim for violation of the APA, Plaintiffs allege that "VA GLA's land deals have been improperly executed pursuant to 38 U.S.C. §§ 8151-8153, which authorize only agreements to share health care resources, and not executed pursuant to 38 U.S.C. §§ 8161-8169, which authorize 'Enhanced Use Leases.'" (FAC ¶ 312.) Plaintiffs further allege that they "have suffered

legal wrong because they have been denied the procedural protections . . . that 38 U.S.C. § 8163 requires." (FAC ¶ 313.) Finally, Plaintiffs allege that "VA GLA's failure to comply with 38 U.S.C. §§ 8151-8153 and 38 U.S.C. § 8161-8169 constitutes arbitrary and capricious agency action; is an abuse of discretion; is in excess of statutory jurisdiction, authority, or limitations, or otherwise without statutory right; and is contrary to law and to procedures required by law." (FAC ¶ 314.) In their request for relief, Plaintiffs seek an "injunction prohibiting VA GLA from executing any agreements under 38 U.S.C. §§ 8151-8153 that do not concern the sharing of health-care resources," and a declaration stating that "[D]efendants violated 38 U.S.C. §§ 8151-8153, 38 U.S.C. §§ 8161-8169 by entering into a number of 'Enhanced Sharing Agreements' unauthorized by any law or regulation." (FAC Req. for Relief ¶¶ E, J.)

In light of these allegations and prayers for relief, the Court agrees with Defendants that land-use agreements other than ESAs are not relevant to Plaintiffs' APA claim. As explained by Plaintiffs in their FAC, entities operate on the WLA Campus under a variety of legal frameworks, including "leases, memoranda of understanding, revocable licenses, [and ESAs]." (FAC ¶ 23.) However, Plaintiffs' APA claim, as set forth above, challenges only agreements entered pursuant to 38 U.S.C. §§ 8151-8153, the sections authorizing ESAs. Plaintiffs argue that "the land deals that are the subject of Plaintiffs' APA claim are the twenty one agreements identified in the master plan and any other 'current agreements' which encumber the WLA Campus, . . . including those specifically referenced in the FAC." (Mot. 4.) Plaintiffs contend that these are "land-use deals that Plaintiffs specifically identified in the FAC and alleged were entered into in excess of statutory authority . . . ." (Mot. 4.) Significantly, however, no statutory authority is cited by Plaintiffs other than the provisions concerning ESAs and Enhanced Use Leases. Further, the other references to these land deals cited by Plaintiffs (FAC ¶¶ 24, 107, 109, 260-263), do not pertain to Plaintiffs' APA claim. Rather, these paragraphs set forth the general factual backdrop for all of Plaintiffs' claims, including their now-dismissed claims for violations of the Rehabilitation Act and claims for breach of charitable trust. Indeed, Plaintiffs acknowledged the limited scope of their APA claim in their Opposition to Defendants' Motion to Dismiss. There, Plaintiffs stated:

> Through their APA claim, Plaintiffs challenge Defendants' improper use of [ESAs] to enter into **certain** land-use agreements that have encumbered large portions of the WLA Campus for the benefit of private and commercial enterprises, but have nothing to do with **providing health care resources that benefit veterans – the sole purpose for which Congress authorized [ESAs], *see* 38 U.S.C. §§ 8151-8153.**

(Opp'n to Mot. to Dismiss 7 (emphasis added).) Plaintiffs also specifically stated that "short-term outleases" are not at issue in Plaintiffs' APA claim. (Opp'n to Mot. to Dismiss 7.) As such, the Court sees no reason to require Defendants to include in the Administrative Record documents unrelated to land-use agreements entered into pursuant to ESAs.

Plaintiffs also argue in their Reply that "[f]or each land-use agreement, the Master Plan identifies the party contracting with DVA as a 'Sharing Partner.' . . . To the extent that Defendants maintain these agreements were not entered into pursuant to the Sharing Authority, the Court cannot resolve that factual question unless Defendants include them in the [Administrative Record]." (Reply 1 n.1.) While it is true that the appendix to the Master Plan lists all of the entities that have land-use agreements with VA GLA as a "Sharing Partner," the description of each agreement clearly states the legal authorization under which the agreement was entered into. (Administrative R. 186-87, ECF No. 96-6.) Agreements entered into pursuant to revocable licenses, leases, and memoranda of understanding have not been included in the Administrative Record because they are not relevant to Plaintiffs' APA claim, as established above. Moreover, because the Government's certification of the Administrative Record is given a presumption of regularity, the Court will not second-guess which agreements were or were not entered into pursuant to 38 U.S.C. §§ 8151-8153 absent some evidence that Defendants have failed to include all ESAs. Plaintiffs have not provided such evidence.

Accordingly, the Court finds that because Plaintiffs' APA claim challenges only those agreements entered into pursuant to 38 U.S.C. §§ 8151-8153, only documentation related to ESAs need be included in the Administrative Record.

b. ESAs No Longer in Effect When the Complaint was Filed

Defendants maintain that they need not produce documentation concerning four ESAs named in the Master Plan[3] because they were no longer in effect in June 2011, when Plaintiffs filed their Complaint. (Opp'n 9-10.) More specifically, Defendants contend that these agreements are not relevant in light of the relief sought by Plaintiffs because "[a] plaintiff has no standing to seek injunctive relief unless the injury alleged is likely to be redressed by a favorable decision[,]" and "allegations of past injury alone are insufficient to confer standing for a declaratory judgment claim." (Opp'n 9-10.)

These statements of law are correct as far as they go; however, they do not stand for the proposition that Defendants need not provide documentation for ESAs no longer in effect as of June 2011. This is so because the discrete land-use agreements entered into by Defendants are not the only injuries alleged by Plaintiffs. Rather, Plaintiffs are also alleging they have been injured by Defendants' ongoing "failure to comply with 38 U.S.C. §§ 8151-8153 and 38 U.S.C. §§ 8161-8169.[4]" (FAC ¶ 313.) Thus, "Plaintiffs lost the assurance that **every land deal unrelated to the**

[3] These include agreements with the City of Los Angeles, Richmark Entertainment, a farmer's market, and agreements allowing filming on the WLA Campus. (Opp'n 9-10 n.11; Administrative R. 186-87.)

[4] These provisions authorize enhanced use leases ("EULs"), which require additional procedural requirements to be met before land-use agreements may be executed.

sharing of health-care resources on the WLA Campus would result in appropriate space for veterans activities, or demonstrable improvements in VA GLA's services." (FAC ¶ 314 (emphasis added).) Thus, "Plaintiffs' APA claim seeks declaratory and prospective injunctive relief regarding Defendants' use of the Sharing Authority . . . on the [WLA Campus] *and* seeks specific relief as to each commercial land deal in place when this action was filed." (Reply 2.) Indeed, this Court has already found that Plaintiffs have alleged a valid procedural injury such that they have standing to assert their APA claims. (*See* March 16, 2012 Order 11-13.) This alleged injury would be redressed if the Court rules in Plaintiffs' favor on their APA claim and grants prospective injunctive relief. *See Cantrell v. City of Long Beach*, 241 F.3d 674, 682 (9th Cir. 2001) (finding that "[t]o establish redressability plaintiffs asserting procedural standing need not demonstrate that the ultimate outcome following proper procedures will benefit them"). And because Plaintiffs are challenging Defendants' pattern of improperly utilizing the enhanced sharing provisions and thereby depriving Plaintiffs of procedural protections, the Administrative Record should include documentation related to ESAs even if the ESAs were no longer in effect at the time the Complaint was filed.

Defendants must therefore supplement the Administrative Record with all documents that were considered by VA GLA when entering the ESAs listed in the Master Plan, including those no longer in effect as of June 2011.

2. Financial Records

Plaintiffs contend that supplementation is required because:

> Defendants included in the [Administrative Record] financial records for certain land-use agreements, . . . but not for others[,] . . . and it is implausible to suggest that DVA did not consider, directly or indirectly, more than just a snippet of financial information before it regarding the revenue it could reasonably expect to receive from land-use agreements before entering into such agreements.

(Mot. 8-9.) Plaintiffs also argue that because the revenue reports provided in the Administrative Record "reflect[] only the payment history for January 1, 2011 to September 1, 2012[,]" Defendants must further supplement the record with records prior to this time frame.[5] (Mot. 9.)

Plaintiffs allege that Defendants circumvented these requirements by improperly using the sharing authority under 38 U.S.C. §§ 8151-8153.

[5] Plaintiffs suggest that the proper time frame is from June 2005 through the present in light of the six year statute of limitations for APA claims. (Mot. 9.) As noted by Defendants, however, statutes of limitations have no bearing on what information is to be included in an administrative record. Rather, it is for the agency to compile and submit the materials it

As an initial matter, the Court finds that Defendants must supplement the Administrative Record with financial records for all ESAs listed in the Master Plan, not just the eleven in effect when the Complaint was filed, for the reasons articulated above.

For those ESAs for which Defendants have already provided financial documentation, however, Plaintiffs have not established that the Administrative Record is incomplete. Mere suggestions of implausibility are not sufficient for this Court to find that Defendants have not compiled and submitted a complete Administrative Record with respect to the eleven ESAs already included. *See Pac. Shores Subdivision, Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 5 (D.D.C. 2006) (explaining that "[c]ommon sense dictates that the agency determines what constitutes the whole Administrative Record because it is the agency that did the considering, and that therefore is in a position to indicate initially which of the materials were before it") (internal quotation marks and brackets omitted).

3. The Sharing Agreement Database

Plaintiffs next observe that Defendants failed to include documents from the Sharing Agreement Database, which was created in 2003 "to provide sufficient information to monitor the use of the sharing authority." (Administrative R. 138.) Plaintiffs argue that it therefore follows that "the database undoubtedly identifies and contains information about the land-use agreements for which Defendants failed to include any documents in the [Administrative Record], and also contains additional information about the eleven agreements that Defendants chose to include in the [Administrative Record]." (Mot. 10.) Plaintiffs further posit that "[l]ogically, DVA would have considered, at least indirectly, the information contained in this [database] . . . when determining the terms and potential value of new land-use agreements." (Mot. 10.)

This rank speculation concerning what was considered by VA GLA is plainly insufficient to require further supplementation of the Administrative Record. *See Blue Ocean Inst. v. Guttierez*, 503 F. Supp. 2d 366, 371 (D.D.C. 2007) (finding that "a theoretical possibility that other records not in the record exist" was insufficient to "defeat[] the presumption that the administrative record is complete"). Plaintiffs also contend that it is evident that Defendants relied on additional materials because a document in the Administrative Record notes that the agency conducted a cost comparison with other land use agreements when determining the pricing of the Westside Breakers Soccer Club ESA. (Mot. 10; Administrative R. 886.) All this establishes, though, is that Defendants considered the terms of existing ESAs when entering new ESAs. Because the Court is already requiring Defendants to include all ESAs listed in the Master Plan in the Administrative Record, this notation does not necessitate further supplementation of the Administrative Record.[6]

---

considered in reaching an administrative decision.

[6] For the same reason, Plaintiffs' argument in their Reply that additional documents from the Sharing Agreement Database and Financial Management System should be included

As noted by Defendants, "a party must make a significant showing—variously described as a 'strong', 'substantial', or 'prima facie' showing—that it will find material in the agency's possession indicative of bad faith or an incomplete record." *Amfac Resorts, LLC v. U.S. Dep't of the Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001) (citing *Overton Park*, 401 U.S. at 420). Plaintiffs have not made such a showing.

Finally, Defendants point out that while some of the documents in the Sharing Agreement Database may have been considered when entering ESAs, these documents have already been included in the Administrative Record, and they are "not obligated to include the same information in the record twice." (Opp'n 14.) The Court agrees.

The Court therefore finds that Defendants need not supplement the Administrative Record to include the Sharing Agreement Database. Defendants need only include those documents considered in entering all ESAs listed in the Master Plan.

4. Miscellaneous Documents

Plaintiffs also contend that it is evident that numerous miscellaneous documents allegedly considered by VA GLA in entering the challenged ESAs are missing from the Administrative Record. (Mot. 10-14.) The Plaintiffs provide a "non-exhaustive catalogue" of these purported deficiencies, listed by ESA.

a. Westside Services

Plaintiffs first note that because VA GLA conducted a request for proposals ("RFP") for this agreement, all proposals received in response should be included in the Administrative Record, as VA GLA would have considered all such proposals in determining which proposal to accept. (Mot. 11.) This point is moot, however, because Defendants already supplemented the Administrative Record with these unsuccessful proposals on November 20, 2012.

Next, Plaintiffs argue that the record for this ESA is deficient because "Defendants have not included any information about which or how many firms received the solicitation [for proposals] or any documents reflecting the basis for, or analysis of, the decision to initiate the solicitation in the first instance." (Mot. 11.) This argument is unavailing because Plaintiffs have not provided any reason to believe that such documents exist or were considered by VA GLA when entering into the Westside Services ESA.

---

because ESAs not yet included were "*directly considered* by Defendants in entering into other ESAs" is also moot. (Reply 3.)

Finally, Plaintiffs note that the original 1999 ESA with Westside Services is not included in the Administrative Record; rather, only the ESA executed in 2002 is present. Defendants counter that "[t]his is consistent with the inclusion in the Administrative Record of only the agreements in effect at the time Plaintiffs filed this lawsuit." (Opp'n 16.) Defendants' argument is unavailing for the reasons articulated above: Plaintiffs' allegation of procedural injury by Defendants' alleged misuse of the enhanced sharing provisions and request for prospective injunctive relief means that all ESAs listed in the Master Plan must be included in the Administrative Record, including those that have expired or been superseded.

b. Sodexho Marriott Laundry Services

Plaintiffs argue that the record relating to the Sodexho Mariott Laundry Services ESA is incomplete because emails already in the Administrative Record "strongly indicate that there were further communications concerning this agreement that have not been included." (Mot. 12.) Plaintiffs also contend that there should be "documents reflecting the basis for Defendants' decisions to modify or renew the agreement." (Mot. 12.) These arguments constitute nothing more than speculation, and they do not provide a basis for this Court to require further supplementation of the Administrative Record.

c. Brentwood School

As with the Sodexho ESA, Plaintiffs argue that (1) documents already in the Administrative Record "strongly suggest" that other documents concerning the renewal of the option on this ESA should be included in the Administrative Record; and (2) documents concerning a modification to the ESA should also be present. (Mot. 12.) These arguments are unavailing to overcome the presumption that Defendants have provided all materials they relied upon in making the decision to enter the Brentwood School ESA.

d. UC Regents

Here, Plaintiffs again argue that the documents included in the Administrative Record "strongly indicate that there were further communications concerning this agreement that have not been included in the [Administrative Record]." (Mot. 12.) This is insufficient for the reasons already set forth above.

Plaintiffs also note that a 2012 memorandum references two attachments, but that neither these attachments nor any other supporting documents for the memorandum are included. (Mot. 12-13.) Such documents are not required, however, because only materials considered by DVA in deciding to enter the UC Regents ESA are required to be included. The most recent ESA with UC Regents was executed in 2001. These other documents named by Plaintiff postdate that agreement and thus are not part of the Administrative Record.

e. Twentieth Century Fox Television

Plaintiffs assert that communications contained in the Administrative Record "strongly suggest[] that there were further communications concerning this agreement that have not been included in the [Administrative Record]." (Mot. 13.) Yet again, this conjecture does not compel a finding that Defendants have failed to include all documents relied upon in entering this ESA.

Further, Plaintiffs state that there is no revenue data for this ESA as the revenue report is blank. (Mot. 13.) Defendants respond that they did not have to include a revenue report at all because it postdates the execution of the ESA, and so it was not a document considered by VA GLA when deciding whether to enter this particular agreement. (Opp'n 17-18.) Rather, they provided the revenue report only to make clear that no revenue was received from Twentieth Century Fox "during the relevant time period," even though the agreement provided for revenue.

The Court finds that because Defendants did not consider the blank revenue report in deciding to enter the ESA with Twentieth Century Fox Television, Defendants were not required to include it in the Administrative Record at all. Plaintiffs' speculation that there should be additional revenue data is unfounded. Thus, further supplementation concerning this agreement is not required.

f. Westside Breakers

Finally, Plaintiffs again speculate that there should be additional documentation concerning how "the proposal [for this ESA] came to be." (Mot. 13.) Again, such speculation is insufficient.

Plaintiffs also argue that various documents related to prior executed ESAs should be included in the Administrative Record. Defendants counter that they are only required to include the version of the agreement currently in effect. This is incorrect. For the reasons already articulated, Defendants must include all documents considered when entering the ESAs listed in the Master Plan, including those agreements that were no longer in effect as of June 2011.

5. Further Discovery Concerning the Scope of the Administrative Record

Plaintiffs contend that because of the "substantial gaps" in the Administrative Record, "it is necessary to obtain deposition testimony from Ralph Tillman, the declarant who has certified that the record is a complete collection of the materials DVA considered[,]" for the purpose of determining the scope of the Administrative Record. (Mot. 14.) Plaintiffs further maintain that such discovery is appropriate because of the bad faith exhibited by Defendants both in misusing the statutory provisions authorizing ESAs and in compiling a "patently incomplete" Administrative Record. (Mot. 15-16.)

Plaintiffs have not satisfied their burden in establishing that deposition testimony concerning the scope of the Administrative Record is necessary. First, as established above, the only "substantial

gap" in the Administrative Record is the absence of the remaining expired ESAs listed in the Master Plan; Plaintiffs have not demonstrated that any other supplementation is needed. Thus, because the Court is already ordering Defendants to include these ESAs and all documents considered by VA GLA in entering these agreements, further discovery is not necessary to establish the scope of the Administrative Record because of purported omissions.

Second, Plaintiffs have not made the showing of bad faith necessary to compel further discovery. Courts may "go beyond the agency record when agency bad faith is claimed. . . . Normally, there must be a strong showing of bad faith or improper behavior before the court may inquire into the thought processes of administrative decisionmakers . . . ." *Pub. Power Council*, 674 F.2d at 795. Plaintiffs aver that Defendants have demonstrated such bad faith by (1) entering ESAs for the specific purpose of avoiding the procedural protections in the EUL provisions; and (2) Defendants significantly supplemented the Administrative Record after they had already certified it. These reasons do not constitute "a strong showing of bad faith or improper behavior." Plaintiffs' claim that Defendants entered into ESAs for the purpose of avoiding the procedural protections inherent in EULs is unsubstantiated at this point, and so it cannot serve as a basis for ordering the deposition of Tillman. *See Havasupai Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991) (finding that the district court correctly barred further discovery when the plaintiff "pointed to nothing in support of its contention that the [agency] acted in bad faith"). And the mere fact that Defendants supplemented the Administrative Record once already does not support the conclusion that Defendants acted in bad faith in compiling it in the first place. *See TOMAC v. Norton*, 193 F. Supp. 2d 182, 195 (D.D.C. 2002) (finding that the fact that defendants supplemented the record did "not raise significant questions as to the completeness of the record"). To hold otherwise would discourage administrative agencies from ever voluntarily supplementing an Administrative Record, even if it is obviously incomplete.

Accordingly, the Court finds that Plaintiffs have failed to demonstrate that the deposition of Tillman is necessary to ensure that the Administrative Record is complete.

III. RULING

For the foregoing reasons, Plaintiffs' Motion to Supplement the Administrative Record is **GRANTED IN PART** and **DENIED IN PART**. **On or before February 18, 2013**, Defendants must supplement the Administrative Record with all material considered either directly or indirectly in entering all ESAs listed in the Master Plan, including those no longer in effect when the Complaint was filed. Plaintiffs' Motion is **DENIED** in all other respects.

IT IS SO ORDERED.